82-1172

NO.

SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

WILLIAM BRATTON,
PETITIONER

V.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

JOHN P. WHITE, JR.

White, Inker, Aronson,
Connelly & Norton, P.C.
One Washington Mall
Boston, Massachusetts 02108
(617) 367 - 7700

Counsel for Petitioner

QUESTION PRESENTED

Does a federal criminal defendant who has introduced evidence after his motion for judgment of acquittal at the close of the government's case in chief was denied, waive his right to challenge the sufficiency of the evidence on appeal if he fails to renew his motion for judgment of acquittal at the close of all the evidence?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Miscellaneous

The petitioner, William Bratton, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on November 2, 1982.

OPINION BELOW

The opinion of the Court of Appeals, which has not yet been reported, appears in the appendix hereto. No opinion was rendered by the District Court for the District of Massachusetts.

JURISDICTION

The judgment of the Court of Appeals was entered on November 2, 1982. This petition for certiorari was filed within sixty days of that date, the sixty-day period being

computed in accordance with U.S. Supreme Court Rule 29.1. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

RULE INVOLVED

Federal Rules of Criminal Procedure:

> RULE 29. Motion for Judgment of Acquittal
>
> (a) MOTION BEFORE SUBMISSION TO JURY. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

STATEMENT OF THE CASE

The petitioner was convicted in the District Court for the District of Massachusetts on four counts of mail fraud (18 U.S.C. §1341), one count of interstate transportation of fraudulently obtained property (18 U.S.C. §2314), and one RICO substantive count (18 U.S.C. §1962(c)). The basis for the District Court's jurisdiction was 18 U.S.C. §3231.

At trial, the petitioner defendant moved pursuant to Fed. R. Crim. P. 29(a) for judgment of acquittal on all counts at the close of the government's case in chief. The motion was denied, and the defendant proceeded to introduce the testimony of one witness. The defendant failed to renew his motion for judgment of acquittal at the close of all the evidence, however.

On appeal, the Court of Appeals ruled that it was a close question whether the evidence was sufficient to sustain conviction on the four mail fraud counts. (Appendix, pp. 4-5) More specifically, the issue was whether the predicate mailings had been for the purpose of executing the alleged fraudulent scheme. (Id.) The Court of Appeals held, however, that the defendant had waived his motion for judgment of acquittal by failing to renew the motion after introducing evidence. The mail fraud convictions were consequently affirmed on the ground that the evidence was not so insufficient as to render the convictions clearly and grossly unjust. (Id. 4-5, 7-8).

The evidence relating to the mail fraud counts, viewed in the light most

favorable to the government and in summarized form, was as follows. In 1978 the motion picture The Brinks Job was produced in Boston, Massachusetts, by Brinks Production, Limited. A number of motor vehicle drivers were supplied under contract by Local 25 of the International Brotherhood of Teamsters to assist in production of the film. The defendant, as driver captain, personally supervised all the Teamster drivers on the production set. One of his responsibilities was on a weekly basis to distribute time cards to all the drivers, collect the cards after they had been filled in, approve them, and take them to the production manager for approval. Paychecks for each driver were prepared on the basis of the timecards by Production Payments, Inc., a company hired by Brinks Production,

Limited, to manage its payroll. The paychecks were then distributed to the drivers by the defendant.

Unbeknown to Brinks Production, two of the drivers for whom time cards were submitted, William O'Leary and Henry Gatto, did not appear for work and were employed full-time elsewhere during the production of the film. The "start-up" forms submitted for these two drivers at the beginning of their supposed employment and their weekly time cards were all filled out by the defendant without the drivers' authorization. The drivers did not receive the paychecks issued to them. Instead, the checks were cashed by one Joseph Manning, the Local 25 member responsible for dealing on behalf of the local with motion picture companies working in New England, and

who in this capacity had appointed the defendant to be driver captain for The Brinks Job. O'Leary and Gatto both later told the F.B.I. that they themselves had submitted start-up slips and had legitimately been on the payroll, though O'Leary later changed his story and admitted that he had not known anything about his supposed employment by Brinks Production until several months afterwards, when Manning asked him to help conceal the scheme from the F.B.I.

The four mailings upon which the mail fraud convictions were based were performed by Production Payments, Inc. Two of the mailings occurred in January 1979, when W-2 forms for 1978 were mailed to O'Leary and Gatto. The forms went to Manning's house because his address had been given on the

start-up slips for O'Leary and Gatto. Gatto attached his W-2 to his 1978 tax return; O'Leary did not.

The other two predicate mailings occurred in September 1978, after all paychecks for O'Leary and Gatto had been issued and cashed by Manning. The items mailed were remittance reports and contribution checks to two employee benefit funds maintained for Local 25 members. The remittance reports showed that O'Leary and Gatto had worked a certain number of hours, and the checks contained amounts withheld from O'Leary's and Gatto's wages as fund contributions. The benefit funds had no way of verifying whether the information contained in the remittance reports was correct.

REASONS FOR ALLOWANCE OF THE WRIT

The affirmance of conviction on the mail fraud counts in the instant case resulted from the Court of Appeals' application of the so-called waiver doctrine. The defendant was deemed to have waived his motion for judgment of acquittal when he introduced evidence, so that his failure to renew his motion at the close of all the evidence left the record without any formal objection to the sufficiency of the evidence. Appellate scrutiny was therefore limited to a determination of whether conviction was a clear and gross injustice.

Under the rules applied in two other circuits, however, the sufficiency of the evidence in the instant case would have been reviewed under the normal appellate standard of whether

the evidence reasonably permitted a finding of each essential element of the offense beyond a reasonable doubt (Jackson v. Virginia, 443 U.S. 307 (1979), rehearing denied, 444 U.S. 890 (1979)). The D.C. Circuit has abrogated the waiver doctrine, and thus reviews the correctness of the denial of a motion for acquittal made at the close of the government's case even if the defendant has introduced evidence. United States v. Pardo, 636 F.2d 535, 547 (D.C. Cir. 1980); United States v. Watkins, 519 F.2d 294, 297 (D.C. Cir. 1975). In deciding the question, only the evidence introduced in the government's case in chief is considered. (Id.) The Eighth Circuit has partially abrogated the waiver doctrine, so that the sufficiency of the evidence is reviewed despite the defendant's

failure to renew his motion at the close of all the evidence, but the determination is based upon all the evidence, not just the evidence introduced in the government's case in chief. United States v. Sanders, 547 F.2d 1037, 1040 n.5 (8th Cir. 1976), cert. denied, 431 U.S. 956 (1977); United States v. Burton, 472 F.2d 757, 763 (8th Cir. 1973).

The majority of the circuits join the First Circuit in giving the waiver doctrine full effect. United States v. Keuylian, 602 F.2d 1033, 1040-1041 (2d Cir. 1979); United States v. Trotter, 529 F.2d 806, 809 n.3 (3d. Cir. 1976); United States v. Sanders, 639 F.2d 268 269 (5th Cir. 1981); United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979), cert. denied, 444 U.S. 994 (1979); United States v. Kampiles,

609 F.2d 1233, 1238 (7th Cir. 1979); United States v. Lopez, 625 F.2d 889, 897 (9th Cir. 1980); United States v. Morris, 623 F.2d 145, 152 (10th Cir. 1980).

The policy arguments in support of the waiver doctrine are extremely weak. The First Circuit justifies the rule on the ground that evidentiary challenges should be put in the first instance to the trial judge. (Appendix, p. 4) This ignores the fact that a motion for acquittal at the close of the government's case does require the trial judge to rule on the sufficiency of the evidence. Appellate review of the trial judge's denial of the motion thus does not offend against the rule that arguments not presented to the trial court should not be permitted on appeal.

It has also been suggested that the waiver doctrine prevents acquittal of guilty defendants by reason of mere careless or inept presentation of evidence by the government. 8A J. Moore, Moore's Federal Practice, ¶ 29.05 (2d ed.).

Trial judges frequently deny motions for acquittal because of the government's inability to appeal the allowance of such motions, and defendants usually introduce evidence in their defense because their failure to do so would likely insure conviction. The government therefore will typically have an opportunity to fill any inadvertent gap in its case during cross-examination in the defendant's case, and the waiver doctrine protects the government's belated repair work from reversal on appeal by preventing

review of the evidence as it stood at the close of the government's case in chief. (Id.)

The problem with this argument is that the waiver doctrine protects not only solid government cases that have been bungled, but also inherently defective government cases that could never be proved without evidence supplied by the defendant. Comment, The Motion of Acquittal: A Neglected Safeguard, 70 Yale L.J. 1151, 1160 (1961). Furthermore, it is far from clear why the government should be relieved from the adverse consequences of its procedural errors when the procedural missteps of defendants are held strictly against them. E.g., Davis v. United States, 411 U.S. 233 (1973).

The principal policy rationale against the waiver doctrine is that the doctrine undermines the privilege against self-incrimination. At the close of the government's case in chief, a defendant is under great pressure to put in his own evidence in order to avoid the almost certain conviction that would otherwise result. If his motion for acquittal has been erroneously denied to protect the government's rights, however, his testimony may fill a gap in the government's case. Although the defendant in such a situation takes the stand of his own choice, it is not a completely free choice, and the pressures that he yields to are of the government's making. Because the waiver doctrine permits affirmance of a conviction obtained under such circumstances, it comes close

to sanctioning compelled self-incrimination.

Whether a federal criminal conviction is affirmed or not should not depend upon which court of appeals is reviewing it. The sufficiency of the evidence in the instant case would have been reviewed had the case been heard by the D.C. or Eighth Circuits. Such an inconsistency within the federal court system should not be allowed to continue. The conflict among the circuits regarding application of the waiver doctrine therefore warrants the grant of certiorari in the instant case.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

WILLIAM BRATTON

By his attorney,

John P. White, Jr.
John P. White, Jr.
WHITE, INKER, ARONSON,
CONNELLY & NORTON, P.C.
One Washington Mall
Boston, MA 02108
(617) 367-7700